In The

Supreme Court of the United States

October Term 1972

No. 72-1129

SUSAN COHEN

Petitioner

v.

CHESTERFIELD COUNTY SCHOOL BOARD
and DR. ROBERT E. KELLY

Respondents

On Writ of Certiorari to the Court of Appeal
for the Fourth Circuit

BRIEF FOR RESPONDENTS

[redacted]

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CITATION TO OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit sitting *en banc* is reported in 474 F.2d 395 (4th Cir. 1973). The opinion of the United States Court of Appeals for the Fourth Circuit initially affirming the judgment of the United States District Court for the Eastern District of Virginia. Richmond Division, is unreported. The decision of the United States District Court for the Eastern District of Virginia, Richmond Division, is reported at 326 F. Supp. 1159 (E.D. Va. 1971).

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on September 14, 1972. On September 20, 1972, respondents filed their Petition for Rehearing and Suggestion for rehearing *en banc,* which Petition and Suggestion was granted on January 2, 1973. The judgment of the United States Court of Appeals for the Fourth Circuit, *en banc,* was entered on January 15, 1973. The petition for a writ of certiorari was filed on February 15, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

U.S. Const. Amend. XIV, Sec. 1

". . . [N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

QUESTIONS PRESENTED FOR REVIEW

I. Is the "strict scrutiny" test applicable to a school board regulation pursuant to which pregnant teachers may be required to take a leave of absence after the fifth month of pregnancy?

II. Are there sufficient reasons, consistent with the Equal Protection Clause of the Fourteenth Amendment, to support a school board regulation pursuant to which pregnant teach-

ers may be required to take a leave of absence after the fifth month of pregnancy?

III. Is there a denial of due process of law where pursuant to Rule 40 of the Federal Rules of Appellate Procedure a United States Court of Appeals grants a rehearing and makes a final disposition of a cause without reargument?

STATEMENT OF THE CASE

This is a case brought under the Civil Rights of 1871, 42 U.S.C. § 1983. The petitioner, formerly employed as a public school teacher by the School Board of Chesterfield County, Virginia, complains that a school board regulation requiring her to be available for a leave of absence at the end of her fifth month of pregnancy discriminates against her as a woman and thereby deprives her of equal protection of the laws as guaranteed by the Fourteenth Amendment of the Constitution of the United States.

Petitioner was employed as a school teacher by the respondent School Board for the 1970-71 school year under an employment contract as required by law. (A-13) That contract provides, in part, that "[t]he said part of the second part [the petitioner] shall comply with all school laws, State Board of Education regulations, and all rules and regulations made by the party of the first part [the respondent School Board] in accordance with the law and State Board of Education regulations. . . ." (A-2)

The petitioner challenges the constitutionality of the respondent School Board's maternity leave regulation, which provides, in pertinent part, as follows:

> a. Notice in writing must be given to the School Board at least six (6) months prior to the date of expected birth.

> b. Termination of employment of an expectant mother shall become effective at least four (4) months prior to the expected birth of the child. Termination of employment may be extended if the superintendent receives written recommendations from the expectant mother's physician and her principal, and if the superintendent feels that an extension will be in the best interest of the pupils and school involved. (A-20, 21)

The rule further provides that upon termination of employment a pregnant teacher goes on maternity leave and continues to enjoy personal benefits during such leave and has a guarantee of reemployment. (A-20, 21)

On or about November 2, 1970, the petitioner notified the respondent School Board in writing that she was pregnant. She stated that her estimated date of delivery was April 28, 1971, and, with the consent of her obstetrician, requested that she be given maternity leave effective April 1, 1971. (A-13)

Her request was denied and effective at the close of school on December 18, 1970, the day before Christmas vacation, maternity leave was granted pursuant to the School Board regulation. (A-13)

On November 25, 1970, the petitioner personally appeared before the School Board and requested an extension of her maternity leave date from December 18, 1970 to January 21, 1971. This was denied. (A-13, 14) The basis for denial was that the School Board had a replacement teacher available for hire. (A-112)

Various reasons were assigned for the existence of the maternity leave regulation. According to respondent Robert F. Kelly, the Division Superintendent of the Chesterfield County, Virginia school system, the main reason for the maternity leave regulation is to foster "continuity of teaching" by giving the School Board advance notice upon which it can

program its need for and secure replacement teachers in an orderly fashion. (A-109, 112, 113)

He also indicated that the maternity leave regulation is based upon a concern for absenteeism of pregnant school teachers, for the safety of the school children in emergency situations, such as fire, and for the safety of the unborn fetus and the expectant mother as a result of the exposure to pushing by students in the school halls and classrooms. (A-60, 61, 64) Similar expressions, although varying in emphasis, were made by the chairman and members of the School Board. (A-44, 48, 49, 56) Petitioner herself introduced expert medical evidence that pregnant teachers who experience no complications are likely to be absent thirteen or fourteen school days because of scheduled doctor appointments. (A-31, 32, 69, 80-81)

The expert medical evidence was that pregnancy is a "normal biological function" and not a sickness or injury. (A-32) The evidence further indicated that pregnancy alone does not incapacitate a school teacher after the fifth month of pregnancy, and that no incapacitating medical disorders are certain to occur after the fifth month of pregnancy. (A-25) It was conceded, however, that no two pregnancies are alike, and that certain incapacitating medical disorders peculiar to pregnancy could occur after the fifth month of pregnancy. (A-24, 73, 74) The United States Court of Appeals for the Fourth Circuit, sitting *en banc*, recognized the School Board's reasons for the regulation and upheld it "as contributing to the better education of the pupils by enabling school officials to arrange a larger degree of continuity in their instruction." 474 F.2d at 399.

SUMMARY OF ARGUMENT

Respondents submit that the classification contained in the Chesterfield County School Board maternity leave regu-

lation is based on pregnancy rather than sex and that the traditional "rational basis" test should be applied to measure the constitutionality of the regulation under the Fourteenth Amendment. Even if the classification is viewed as affecting only women, it should not be deemed suspect and viewed with strict judicial scrutiny since, unlike the statutes which this Court held unconstitutional in *Reed* v. *Reed,* 404 U.S. 71 (1971) and *Frontiero* v. *Richardson,* ..... U.S. ....., 36 L. Ed. 2d 583 (1973), the maternity leave rule does not have the effect of invidiously relegating the entire class of females to an inferior legal status or discriminating in favor of males. Moreover, the suspect classification adopted by four justices of this Court in *Frontiero* is inapplicable to the instant case because *Frontiero* recognizes physical disability as a non-suspect classification.

The challenged regulation represents a legitimate effort to provide a better education to pupils in the Chesterfield County School system by allowing school officials to plan for expected turnovers in personnel because of pregnancy and to insure that there is no interval during which a qualified teacher is not available to assume the duties of a teacher on maternity leave. That this is the purpose of the regulation is reflected in the provision which permits the School Board to retain a teacher beyond the fifth month of pregnancy if a qualified replacement is unavailable and the pregnant teacher is willing to remain. Thus, when the case at bar is examined in accordance with the equal protection analysis employed by the Court in *Weber* v. *Aetna Casualty and Surety Company,* 406 U.S. 164 (1972), it is manifest that continuity of education is a legitimate state interest and that the maternity leave rule does not interfere with petitioner's fundamental rights.

Respondents maintain that the challenged maternity leave regulation is not arbitrary and does not constitute invidious

discrimination. Furthermore, the rule should be upheld under either the "rational basis" or "strict scrutiny" tests.

ARGUMENT I.

The Maternity Leave Regulation Under Which Pregnant Teachers May Be Required To Take A Leave Of Absence Is Not Based On Sex, And, Therefore, The "Strict Scrutiny" Test Is Not Applicable.

As observed by Mr. Justice Powell in *San Antonio School District* v. *Rodriquez,* U.S. , 36 L. Ed. 2d 16, 34 (1973), in equal protection cases many courts have virtually assumed that a particular classification is suspect "[r]ather than focusing on the unique features of the alleged discrimination. . . ." The case at bar presents a situation where the initial inquiry concerning the nature of the challenged classification is especially appropriate, since the issue raised by the petitioner relating to the application of a "strict scrutiny" test is entirely irrelevant unless the policy of the School Board involves a classification based on sex. Respondents submit that the Fourth Circuit correctly held that the classification involved is not based on sex, but is focused on a physical condition resulting in absenteeism at a fixed date—namely, pregnancy. Chief Judge Haynesworth properly rejected as simplistic Mrs. Cohen's argument that a maternity leave regulation is based on sex:

> We conclude, first, that the regulation is not an invidious discrimination based upon sex. It does not apply to women in an area in which they may compete with men. . . .
>
> We do not accept Mrs. Cohen's premise that the regulations provision which denies her, with the advice of her doctor, the right to decide when her maternity leave will begin is an invidious classification based upon sex which may be justified only by some compelling state

> interest. Such invidious discriminations are found in situations in which the sexes are in actual or potential competition. A statutory preference for men over women in the appointment of administrators was recently striken by the Supreme Court as quite unjustified by considerations of administrative convenience. [Footnote omitted]
>
> Only women became pregnant; only women become mothers. But Mrs. Cohen's leap from those physical facts to the conclusion that any regulation of pregnancy and maternity is an invidious classification by sex is merely simplistic. The fact that only women experience pregnancy and motherhood removes all possibility of competition between the sexes in this area. . . . Pregnancy and motherhood do have a great impact on the lives of women, and, if that impact be reasonably noticed by a governmental regulation, it is not to be condemned as an invidious classification. 474 F.2d at 397.

An examination of the decisions reveals that it has been universally held that a classification based on sex is one which denies to one sex a right or privilege which is given to the other sex. Thus, a disparity in treatment between the sexes is necessary before a classification can be said to rest on sex. The authorities cited by petitioner in her brief offer prime examples of sex classifications. In each the challenged rule or law treated similarly situated men and women differently. For example, in *Frontiero* this Court held unconstitutional statutes which disallowed a servicewoman to claim her husband as a dependent for purposes of obtaining increased quarters allowance and medical and dental benefits unless she proved that he was in fact dependent upon her for over one-half of his support, yet a serviceman was permitted to claim his wife as a dependent without showing that she was dependent upon him for any part of her support. Mr. Justice Brenman, speaking for four justices, be-

lieved that the statutes violated the Fifth Amendment, because they "*command 'disimilar treatment for men and women who are . . . similarly situated.*'" 36 L. Ed. 2d at 593. (Citing *Reed, supra*, 404 U.S. at 77) (Emphasis supplied).

Both Justice Brennan in *Frontiero* and Chief Judge Haynesworth in *Cohen* cited Reed for the proposition that the equal protection clause proscribes unreasonable discrimination between persons similarly situated. *Reed* involved an arbitrary preference of males over females when both were equally qualified and both wished to qualify for administration of an estate. In holding such a statutory scheme unconstitutional, this Court stated that "[t]o give a mandatory *preference to members of either sex over members of the other* . . . is to make the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause of the Fourteenth Amendment. . . ." 404 U. S. at 76 (emphasis supplied).

Clearly, for a classification to be based on sex there must be discrimination against one sex and discrimination in favor of the other. Recent Title VII cases demonstrate that by definition a sex classification is one which causes different treatment of men and women who are in all other respects similarly situated. Typical in this regard is *Phillips* v. *Martin Marietta Corp.*, 400 U.S. 542 (1971), a case which involved a rule of employment applicable to women with preschool children but not applicable to men with pre-school children. As this Court noted, "The Court of Appeals therefore erred in reading this section as permitting one hiring policy for women and another for men—each having preschool-age children." *Id.* at 544.

The petitioner relies on the language of Judge Brown in his dissent below in *Phillips,* 416 F.2d 1257, 1259 (5th Cir. 1969), where he discusses the distinguishing factor—mother-

hood versus fatherhood. Petitioner would apply this same argument to the facts of our case. Yet, she ignores the fact that in *Phillips* the distinguishing factor *was* sex—fatherhood versus motherhood. In the present case the distinguishing factor is not sex. It is *pregnant* women versus all other women and all men. Women may fall into either category of pregnant or nonpregnant, and the category into which they fall depends only on the condition of pregnancy. Petitioner attacks the maternity provision not because she is a woman treated differently from men, but because she is pregnant and thereby subject to the maternity provision. Her complaint is that pregnant women are treated differently from non-pregnant women and all men. Her complaint does not show a disparite treatment between men and women.

Petitioner has in her brief relied on other Title VII cases which, unlike the case at bar, involve prime examples of sex classifications. For instance, in *Sprogis* v. *United Air Lines, Inc.* 444 F.2d 1194 (7th Cir.), *cert. denied*, 404 U.S. 991 (1971), the challenged employment policy prohibited stewardesses from being married, but allowed male stewards to be married. The policies thus discriminated against women and in favor of men—a plain denial of equal protection. By comparison, pregnancy is *sui generis* in that it is a physiological condition which only affects women and not men. Indeed, petitioner cites the dissent in *Schattmen* v. *Texas Employment Commission*, 459 F.2d 32, 42 (5th Cir. 1972), *cert. denied*, 41 U.S. L.W. 3372 (Jan. 8, 1973) for the same proposition. However, this very fact—that only a woman may become pregnant—compels a finding that a classification based on pregnancy is not a classification based on sex because it in no way affects males. This conclusion was reached by the majority in *Schattman*, which rejected the argument that the maternity leave regulation of the Texas Employment Commission discriminated on the basis of sex:

"It did not terminate her employment because she was a woman or because she became pregnant but only because her pregnancy was far advanced." *Id.* at 39. And, in *Bravo* v. *Board of Education*, 345 F. Supp. 155, 157 (N.D. Ill. 1972), a similar interpretation was made with respect to a maternity leave rule for teachers:

> The court disagrees with the plaintiff's assertion that § 4-37's classifications constitute sex discrimination and need not, therefore, pass on the difficult question of whether sex is an inherently suspect criterion.

A classification based on pregnancy is one which discriminates between categories of women rather than between the sexes. In like manner, a rule affecting only men, as for example a regulation prohibiting the wearing of beards or moustaches, does not result in sex discrimination. As stated by the court in *Rafford* v. *Randle Eastern Ambulance Service, Inc.*, 348 F. Supp. 316, 319-20 (S.D. Fla. 1972):

> It has been held that a company's policy of terminating the employment of pregnant females violated [Title VII] because it involved termination based on "a condition attendant to their sex." [citation omitted] I respectfully disagree with such an expansive reading of Title VII. The discharge of pregnant women or bearded men does not violate the Civil Right Act of 1964 simply because *only women become pregnant and only men grow beards. In neither instance are similarly situated persons of the opposite sex favored.* These cases are perhaps more properly considered under the rubric of Cooper v. Delta Air Lines, Inc., 274 F. Supp. 781 (E.D. La. 1967), that discrimination between different categories of the same sex is not unlawful discrimination by sex. This is a case of discrimination in favor of men who shave off their beards and moustaches. It does not involved proscribed sex discrimination. (emphasis supplied)

By contrast, a rule which limits the length of men's hair but not women's hair is plainly sex discrimination because both sexes are able to grow long hair.

The argument that a maternity policy is a discrimination against women because of a condition attendant to their sex ignores the fact that pregnancy is *sui generis* and that men are not affected by any experience similar to pregnancy. Thus, with regard to pregnancy men and women are different. And this Court has consistently held "that the Fourteenth Amendment does not deny to States the power to treat different classes of persons in different ways." *Reed, supra*, 404 U.S. at 75. In application of this principle to the facts of this case Chief Judge Haynesworth wrote: "How can the state deal with pregnancy and maternity in terms of equality with paternity? It cannot, of course" *Cohen, supra*, 474 F.2d at 398.

It is equally manifest that the contention that a maternity leave rule may be compared to a sick leave policy which allows men to take scheduled or unscheduled leave on account of sickness or injury must fail simply because pregnancy is not a sickness or injury. This is made clear in petitioner's deposition of Doctor Leo J. Dunn, Professor and Chairman of Obstetrics and Gynecology for the Medical College of Virginia:

> Q Is pregnancy a sickness or injury?
>
> A No.
>
> Q Could you give a medical definition of what pregnancy is in physical relationship?
>
> A *It is a normal biological function.* It should not be regarded as an illness anymore than menstrual periods should be regarded as an illness or any bodily function should be considered as an illness. *An illness is when* [a] *bodily function is deranged, there is* [a]

> *malfunction of symptoms and pregnancy is, of course, a normal biologic phenomena.* (A-32) (emphasis supplied).

Thus, the comparison of a woman's "normal biological function" with a man's sickness or injury is a classic example of comparing apples with oranges.

It is clear from the record in this case that the maternity leave regulation is not an invidious scheme to restrict women from teaching in the Chesterfield School System. In fact, approximately 85% of the teachers in the system are women, the petitioner's replacement was a woman, and in large part women teachers recommended that the School Board adopt the present maternity leave policy. (A-39) The petitioner cannot seriously argue that the maternity leave regulation discriminates in favor of men and against women. This is not a policy aimed at preferring men to women. It is a policy calculated to minimize the disruption which attends pregnancy, and the only question is whether the classification is reasonable and rests "upon some ground of difference having a fair and substantial relation to the object of the legislation. . . ." *Reed, supra,* 404 U.S. at 76, quoting *Royster Guano Co.* v. *Commonwealth,* 253 U.S. 412, 415 (1920).

ARGUMENT II.

The Maternity Leave Regulation Classifying Women On The Basis Of Their Physical Condition Is Not A "Suspect Classification," And, Therefore, The "Strict Scrutiny" Test Is Not Applicable.

Petitioner has argued that, assuming a classification based on sex, a suspect classification arises and the "strict scrutiny" test, sometimes applied in equal protection cases involving discrimination based on race, alienage or national origin, should be applied. To support this proposition petitioner cites as authority Mr. Justice Brennan's opinion in *Frontiero.*

Respondents submit that the classification is not based on sex, but even assuming that it does make a distinction between the sexes, there are other policy considerations in this case which militate against a determination that the classification is suspect. Respondents further assert that *Frontiero,* when viewed in the light of previous decisions by this Court setting forth the reasons for applying a strict judicial scrutiny test to particular classifications, supports the contention that a rule which places pregnant women in one category and other women and all men in another does not create an inherently suspect classification.

While it has been held that the central purpose of the Fourteenth Amendment was to eliminate racial discrimination, *McLaughlin* v. *Florida*, 379 U.S. 184, 192 (1964), and that racial classifications are constitutionally suspect and therefore subject to the most rigid judicial scrutiny, *Bolling* v. *Sharpe*, 347 U.S. 497 (1954), the Court has extended the suspect label to classifications similar to race, such as alienage and national origin. As recently noted by Mr. Justice Marshall in his dissenting opinion in *Rodriquez*, 36 L. Ed. 2d at 85-87 (1973), the reasons for applying the suspect classification analysis are basically threefold. First, "[c]ertain racial and ethnic groups have frequently been recognized as 'discrete and insular minorities' who are relatively powerless to protect their interests in the political process." Second, certain classifications are "in most circumstances irrelevant to any constitutionally acceptable legislative purpose." And, third, generally the basis for a suspect classification—as, for example, the color of one's skin or the legitimacy of one's birth—is something the individual cannot control.

It is submitted that a classification based on pregnancy is in important respects different from those classifications which the Court has previously held suspect and the classifi-

cation should therefore be sustained if not totally irrelevant to any legitimate state interest. Although it is conceded that pregnant women are a minority, there is no evidence that as a group they lack the power and the resources to effect change through the political process. In fact the record in this case reflects that the policy was adopted with the recommendation of the teachers. Moreover, because pregnancy, unlike race, is a valid basis for measuring the physical capabilities of individuals, the pregnancy classification cannot be deemed to be *per se* irrelevant to any acceptable legislative purpose. Lastly, and perhaps most importantly, pregnancy is something the individual can control. Modern birth control devices are generally recognized as effective in allowing a woman to prevent pregnancy or to plan her pregnancy for the time most convenient to her, her family, and society.

Even assuming that a rule which treats pregnant women differently than nonpregnant women and men makes a sex classification, a point which respondents do not concede, the facts of the case at bar demonstrate that sex should not be viewed as a suspect classification. When examined in light of the reasons given by this Court for applying the suspect classification analysis, it is significant to note that women are not a minority but are in fact a majority of the population and now have it within their means to obtain ameliorative legislation through the political process. Indeed, the Equal Pay Act of 1963, 29 U.S.C. § 206(d), Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e, *et. seq.*, the proposed Equal Rights Amendment, and regulations promulgated by administrative agencies such as the EEOC are prime examples of the ability of women to effect change where change is needed.

While it is plain that women are unable to change their sex, it cannot be forgotten that women can determine when and if they will become pregnant. In addition, the fact that

only women can experience pregnancy indicates at the very least that pregnancy is an important and judicially recognizable difference between the sexes. Sex, then, unlike race or alienage, cannot be said to be *per se* irrelevant to any constitutionally acceptable legislative purpose. That sex should not be deemed a suspect classification has been the position taken by this Court, and reason and sound judicial policy indicate that on the facts of the case at bar this position should not be changed.[1]

Respondents do not take the untenable position that the Court should hold that the Fourteenth Amendment permits arbitrary sex discrimination. Respondents do maintain that because of the fact that there *are* differences between the sexes—namely, pregnancy—and since women have the power to protect themselves through the political process, sex classifications are in many instances more appropriately judicially examined under the traditional "rational basis" test. The overwhelming weight of authority supports respondents' position that sex classifications should not be viewed with strict judicial scrutiny. *Reed* v. *Reed,* 404 U.S. 71 (1971);

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[1] Sex, unlike race, national origin, and alienage, has often been justified as a distinguishing factor in employment practices. See, e.g., *Kisley* v. *City of Falls Church,* 212 Va. 693 (1972), holding that a municipal ordinance which restricted employment opportunities in massage parlors by requiring that services be rendered to customers be performed by an employee of the same sex as the customer does not deprive such employees of their constitutional right to equal protection of the law. The ordinance *applied alike to both males and females,* and was a reasonable regulation designed to maintain the moral welfare of the community under the police power of the municipality. See also, *Hodgson* v. *Robert Hall Clothes, Inc.,* 473 F.2d 589 (3rd Cir. 1973), a case decided under the Equal Pay Act of 1963, where the Court of Appeals for the Third Circuit noted that assignment of males to the men's department and females to the women's department was justified by the *business necessity* of avoiding embarrassment to customers trying on clothes. What the courts here are recognizing is that (1) certain differences between men and women do exist, and (2) sometimes these differences can legitimately affect employment practices.

Hoyt v. *Florida*, 368 U.S. 57 (1961); *Goesaert* v. *Cleary*, 335 U.S. 464 (1948); *West Coast Hotel Co.* v. *Parrish*, 300 U.S. 379 (1937); *Radice* v. *New York*, 264 U.S. 292 (1924); *Gruenwald* v. *Gardner*, 390 F.2d 591 (2d Cir.) *cert. denied*, 393 U.S. 865 (1968); *Williams* v. *McNair*, 316 F. Supp. 134 (D.S.C. 1970), *aff'd without opinion*, 401 U.S. 951 (1971).

In *Reed* the Court struck down a statute under the Equal Protection Clause which preferred male candidates to female candidates for qualification on estates. In doing so, the Court applied the traditional "reasonable" test:

> In applying that clause, this Court has constantly recognized that the Fourteenth Amendment does not deny to States the power to treat different classes of persons in different ways. *Barbier* v. *Connolly*, 113 U.S. 27 (1885); *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U.S. 61 (1911); *Railway Express Agency, Inc.* v. *New York*, 336 U.S. 106 (1949); *McDonald* v. *Board of Election Commissioners*, 394 U.S. 802 (1969). The Equal Protection Clause of that Amendment does, however, deny to states the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute. *A classification "must be reasonable*, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." *Royster Guano Co.* v. *Virginia*, 253 U.S. 412, 415 (1920). 404 U.S. at 75-76 (emphasis supplied).

According to Mr. Justice Brennan and three other justices in *Frontiero, supra, Reed* implicitly held that sex is a suspect classification. Such a position is not only not supported by the decisions of this Court (see Mr. Justice Powell's concurring opinion in *Frontiero*, 36 L. Ed. 2d at 595), it is also in conflict with the many lower court cases and law review

articles which have interpreted *Reed* as holding that a classfication based on sex is not inherently suspect. *Eslinger* v. *Thomas,* 476 F.2d 225 (4th Cir. 1973); *Robinson* v. *Board of Regents of Eastern Kentucky University,* 475 F.2d 707 (6th Cir. 1973); *Green* v. *Waterford Board of Education,* 473 F.2d 629 (2nd Cir. 1973); *Cohen* v. *Chesterfield County School Board,* 474 F.2d 395 (4th Cir. 1973); *Schattman* v. *Texas Employment Commission,* 459 F.2d 32 (5th Cir. 1972) *cert. denied* 41 U.S.L.W. (Jan. 8, 1973); *Feinerman* v. *Jones,* 356 F. Supp. 252 (M.D. Pa. 1973); *Flores* v. *Secretary of Defense,* 355 F. Supp. 93 (N.D. Fla. 1973); *Bucha* v. *Illinois High School Association,* 351 F. Supp. 69 (N.D. Ill. 1972); *Heath* v. *Westerville Board of Education,* 345 F. Supp. 501 (S.D. Ohio 1972); *Bravo* v. *Board of Education,* 345 F. Supp. 155 (N.D. Ill. 1972); *Brenden* v. *Independent School District 742,* 342 F. Supp. 1224 (D. Minn. 1972). Cf. *Romans* v. *Crenshaw,* 354 F. Supp. 868 (S.D. Tex. 1972); *Williams* v. *San Francisco Unified School District,* 340 F. Supp. 438 (N.D. Cal. 1972). See also *Archer and Johnson* v. *Mayes,* 213 Va. 633 (1973). In a recent commentary on the proposed Equal Rights Amendment, Senator Birch Bayh stated:

> [T]he Court [in *Reed*] did not overrule such cases as *Goesaert* and *Hoyt,* and it did not hold that sex discrimination is "suspect" under the fourteenth amendment. Instead the Court left the burden on every woman plaintiff to prove that governmental action perpetuating sex discrimination is unreasonable.

Bayh, *The Need for the Equal Rights Amendment,* 48 Notre Dame Lawyer 80, 85 (1972). See also Sedler, *The Legal Dimensions of Womens Liberation: An Overview,* 47 Ind. L. Rev. 419 (1972); 25 Vand. L. Rev. 412 (1972); 1972 Wis. L. Rev. 626 (1972).

Of course, this Court makes the final interpretation of the Constitution and declares the scope of its protection. It is respectfully submitted, however, that in light of previous

decisions of the Court consistently holding that sex discrimination is not inherently suspect and because this position has been steadfastly maintained in the lower courts, neither *Reed* nor *Frontiero* should now be read as making sex a suspect classification.

A close reading of Mr. Justice Brennan's opinion in *Frontiero* reveals that his reasoning in that case supports respondents' argument that the classification in the case at bar should not be regarded as suspect. The statute in *Frontiero*, unlike the maternity rule in this case, plainly discriminated on the basis of sex. The following statement by Justice Brennan underscores the important differences between the two cases:

> [W]hat differentiates sex from such nonsuspect statutes as intelligence or physical disability, and aligns it with the recognized suspect criteria, is that the sex characteristic frequently bears no relation to ability to perform or contribute to society. [Footnote omitted] As a result, statutory distinctions between the sexes often have the effect of invidiously relegating the entire class of females to [an] inferior legal status without regard to the actual capabilities of its individual members. 36 L. Ed. 2d at 592.

Initially, it must be noted that the classification in this case—that is, pregnant women versus nonpregnant women and all men—is analogous to classifications based on physical disability in that pregnancy manifestly bears a relation to ability to perform and contribute to society. That this is so becomes even more apparent when the maternity regulation is compared to a traditionally suspect classification such as race, which has absolutely nothing to do with ability to perform. While there is disagreement concerning the type of functions pregnant women are unable to perform and the extent of their disability, experts concede that pregnancy does result in a diminution in a woman's ability to perform certain tasks

and at a given point in time she will be completely incapable of performing certain tasks. Thus, it cannot be said that pregnancy is irrelevant to any constitutionally acceptable legislative purpose and should be deemed suspect.

It is also perfectly manifest that the maternity regulation does not have the effect of "relegating the entire class of females to [an] inferior legal status without regard to the actual capabilities of individual members." The rule applies only to pregnant women and does not discriminate against females in general or in favor of men. Even if the classification is deemed to be based on sex, it only affects women who decide to become pregnant.

ARGUMENT III.

The Maternity Leave Regulation Does Not Prejudice Any Constitutional, Fundamental Or Civil Rights Of Pregnant Teachers, And, Therefore, The "Strict Scrutiny" Test Is Not Applicable.

Petitioner argues that the maternity leave regulation must be viewed with strict scrutiny because it contravenes her fundamental right to public employment, her right to privacy, and her right to marry and procreate. This argument is not supported by reason, authority, or the facts of this case.

At the outset, it is important to point out that petitioner has incorrectly cited *Butchers' Union* v. *Crescent City*, 111 U.S. 746 (1884) and *Truax* v. *Raich*, 239 U.S. 33 (1915) as holding that the right to employment is explicitly or implicitly guaranteed by the Constitution. The basis for the Court's holding in *Butcher's Union*, which is expressed in an opinion written by Mr. Justice Miller, is that a state legislature cannot by contract limit the exercise of the police powers of the state to the prejudice of the general welfare, the public health, and the public morals. The language quoted by petitioner in her brief is taken from Mr. Justice Bradley's concurring opinion.

Truax did not affirm *Butcher's Union,* but held on its facts that a classification based on alienage was a denial of equal protection.

Indeed, petitioner's argument that there is a fundamental right to public employment has been explicitly rejected in several recent decisions. In *Patrone* v. *Howland Local Schools Board of Education,* 472 F.2d 159 (6th Cir. 1972), it was held that a teacher has no constitutional rights arising above those of her contract and the laws of the state. Moreover, in *Johnson* v. *Branch,* 364 F.2d 177, 179 (4th Cir. 1966), *cert. denied,* 385 U.S. 1003 (1967) the court stated: "There is no vested right to public employment. No one questions the fact that the plaintiff has neither a contract nor a constitutional right to have her contract renewed. . . ." To the same effect is *Orr* v. *Trinter,* 444 F.2d 128, 133 (6th Cir. 1971), *cert. denied,* 408 U.S. 943 (1972), which held that a teacher's constitutional rights had not been violated by an unexplained refusal to renew his contract.

Recently the Court in *Rodriquez* held that there is no fundamental right to public education:

> Education, of course, is not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying it is implicitly so protected. 36 L. Ed. 2d at 44.

Certainly, if a student in a public school has no fundamental constitutional right to an education, it is clear that a teacher instructing that student has no fundamental constitutional right to teach, unless it is proved, as it has not been done here, that removal will result in a denial of other fundamental rights such as freedom of speech. See, e.g., *Pickering* v. *Board of Education,* 391 U.S. 563 (1968).

Petitioner's argument that the maternity leave policy interferes with her rights to privacy, marriage and procreation

has no basis in reason. The rule does not infringe upon a woman's right to get married, it does not invade the privacy in the home, it does not attempt to dictate when and if a woman should become pregnant and have children, and it does not intrude into an individual's private life during pregnancy.

The only "right" involved in this case is the asserted right of a teacher to be employed during the advanced stage of her pregnancy. Surely this is not a right explicitly or implicitly guaranteed by the Constitution, *Eisenstadt* v. *Baird,* 405 U.S. 438 (1972), *Dandridge* v. *Williams,* 397 U.S. 471 (1970), nor is there a sufficient nexus between a constitutional guarantee and a non-constitutional interest so as to warrant the application of the strict judicial scrutniy test. *Rodriquez, supra,* 36 L.Ed. 2d a 83-84 (Marshall, J., dissenting). Instead, this is a case involving the relationship of a teacher in a public school system with her employer. As Mr. Chief Justice Berger stated in his concurring opinion in *Perry* v. *Sinderman,* 408 U.S. 593, 603 (1972):

> [T]he relationship between a state institution and one of its teachers is essentially a matter of state concern and local law.

ARGUMENT IV.

The Maternity Leave Regulation Is Valid Under Either The "Rational Basis" Test Or The "Strict Scrutiny" Test.

In the final analysis the petitioner's brief has focused on the issue of burden of proof in equal protection cases involving classifications based on sex. Her purpose is to require the respondents to carry the burden of proving a compelling state interest for the existence of the maternity leave regulation. The respondents were not faced with this burden below. Even so, their evidence sets forth a reasonable basis for the regulations. Under the "reasonableness" test the reason for

the regulation may consist of matters conceived of by the court itself, and need not be literally stated in the respondent's evidence.[2] Respondents also submit that even if tested by the "strict scrutiny" test, the challenged regulation in the case at bar does not violate the equal protection clause.

The record shows that the main reason for the maternity leave regulation is to foster "continuity of teaching" by giving the respondent School Board advance notice upon which it can program its need for and secure replacement teachers in an orderly fashion.

Contrary to petitioner's assertions, and unlike the regu-

[2] The petitioner argues that even under the reasonableness test, the court can rely only on the facts and logic set forth by the defendants. The plaintiff cites *Johnson* v. *Branch,* 364 F.2d 177, 181 (4th Cir. 1960), *cert. denied,* 385 U.S. 1003 (1967), for the proposition that in testing the exercise of discretion by the board the court may consider only the logic relied on by the School Board itself. In *Johnson* the School Board was vested by statute with the discretion to re-employ a teacher in the next school year. The court there merely said that in reviewing this exercise of discretion, it must rely on the facts and logic used by the Board. Our case is dissimilar. Here the respondents have not exercised discretion. They have simply applied a regulation, the constitutionality of which may be tested by a review of the regulation itself. Under such standards of review, the court is not limited to a critique of the logic which some members of the Board may attribute to the regulation. Under the traditional test the respondents and the court may justify the regulation at any time by the application of sound reason. As long as a valid objective is established and the regulation in question reasonably advances this objective, the regulation does not violate the Equal Protection Clause. "When the classification in such a law is called in question, *if any state of facts reasonably can be conceived that would sustain it,* the existence of that state of facts at the time the law was enacted must be assumed." (Emphasis supplied). *Morey* v. *Doud,* 354 U.S. 457, 464 (1957). In *Royster Guano Co.* v. *Commonwealth,* 253 U.S. 412, 416 (1920), cited recently by the Supreme Court in *Reed* v. *Reed, supra,* the Court said, in dealing with the attack on a tax statute as violative of equal protection, "But no ground is suggested, *nor can we conceive of any,* sustaining this exemption. . . ." (Emphasis supplied) And in *McGowan* v. *Maryland,* 366 U.S. 420, 426 (1961) the Court stated: "A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it."

lations involved in many other cases, as for example *Green* v. *Waterford Board of Education*, 473 F.2d 629 (2d Cir. 1973), *LaFleur* v. *Cleveland Board of Education*, 465 F.2d 1184 (6th Cir. 1972), and *Schattman* v. *Texas Employment Commission*, 459 F.2d 32 (5th Cir. 1972), *cert. denied*, 41 U.S.L.W. 3372 (Jan. 8, 1973), the maternity leave rule in this case is not mandatory. Instead, the regulation provides in pertinent part:

> Termination of employment may be extended if the superintendent receives written recommendations from the expectant mother's physician and her principal and if the superintendent feels that an extension will be in the best interest of the pupils and school involved.

This provision which permits the superintendent in his discretion to extend the period during which a pregnant teacher may teach is important because it provides the flexibility which is needed to account for unusual hardships affecting the pregnant teacher, and because in some situations a replacement teacher may be unavailable and it will be necessary to retain the pregnant teacher until a qualified replacement can be found. In this case there is no evidence that Mrs. Cohen would experience any undue hardship by virtue of commencing her leave four months before her expected delivery date, but there was evidence that the School Board had a replacement teacher available for employment on Mrs. Cohen's scheduled maternity leave date.

The plaintiff has played the numbers game in an effort to show the regulation is arbitrary by questioning why the leave is not required after the third month, or the fourth, or the sixth, and so on, of pregnancy (A. 123). Admittedly, there is nothing magic in tying the maternity leave to the fifth month of pregnancy. However, by doing so, the Board has fixed a date on which it can plan for replacements and has allowed a period of at least four months in which it may ex-

tend this date. To argue that the same or similar objectives could be accomplished by requiring leave after the third, fourth or sixth month begs the question. This does not show that the regulation is arbitrary; it merely shows that there are other ways to accomplish the same objective.

Pregnancy, unlike other medical conditions, has a unique predictability. On or about nine months from conception a pregnant school teacher will be unavailable to perform her duties.

With this in mind the School Board must follow some uniform procedure to provide for the replacement of pregnant teachers in a manner calculated to cause the least disruption in the classroom and in the continuity of education. Anything less than a uniform procedure would be unfair to the teachers themselves.

That continuity in the educational program is the chief reason for requiring maternity leave to commence four months before the anticipated date of birth is clear from the testimony of the Division Superintendent of the Chesterfield County School System, Dr. Robert F. Kelly:

> This is the main thesis behind the maternity leave. If we wish and hope to continue the continuity of teaching, there is a point about which we would like to know that a teacher is going to leave so that we can start looking for a qualified replacement for that teacher. (A. 109)

In this case the regulation achieved that very purpose. Thus, Dr. Kelly further testified as follows:

> She was told that she would leave at the end of the fifth month which at this particular time happened to run around December 18. Another request came in from both Mrs. Cohen and the principal requesting that she be able to remain until the end of the first semester which would have been around January 21. In consultation with the personnel department it was deter-

> mined that by happenstance we had an applicant with a master's degree and experience equal to Mrs. Cohen, that we could hire the person right after the Christmas vacation, and it was felt at that point that that would be better for the students and the continuity of the program. And her request was denied. (A. 112)

Other reasons were given as further bases for the regulation. Dr. Kelly and the members of the School Board indicated that the maternity leave regulation represents a concern for excessive absenteeism by teachers during the last four months of pregnancy, injury to the pregnant teacher or her fetus, or both, as a result of exposure to pushing and shoving by students in the halls and classrooms, education of students who could be distracted by the physical appearance of a pregnant teacher, and the safety of the pregnant teacher and her students in emergency situations, such as fire. Petitioner's expert witnesses testified that pregnant teachers who experience no complications are likely to be absent thirteen or fourteen school days because of scheduled doctor appointments. (A-31, 32, 69, 80-81) These reasons, which vary in emphasis, illustrate the range of justification for the regulation.

These reasons illustrate, too, that the regulation is addressed to conditions of potential import. Must the School Board, for example, await a fire in a school and injury to a teacher in her eighth month of pregnancy who cannot negotiate a crowded hall of excited students before a regulation requiring maternity leave at the end of the fifth month has a rational justification? The answer is, and should be, an emphatic no.

Perhaps most teachers could respond satisfactorily to such an emergency in their eighth, or even their ninth, month of pregnancy, although medical experts concede that coordination, agility and dexterity are diminished in the last months

of pregnancy (A. 34, 80). The expert medical evidence shows that no two pregnancies are alike. Different women are affected in different ways. For this reason it is entirely reasonable for the School Board to have a maternity leave regulation addressed in part to potential conditions that could arise, if only in some small number of cases.

Perhaps most teachers would not suffer any complications during the last four months of their pregnancy. But here, too, we are reminded that no two pregnancies are identical, and that there are some medical complications peculiar to pregnancy which usually occur only during the last months of pregnancy (A. 24). In view of this potential for complications, and the attendant unavailability of the teacher with little or no advance notice, the School Board may properly undertake to minimize the risks with a regulation which requires maternity leave after the fifth month of pregnancy.

Petitioner incorrectly maintains that the purpose of the maternity rule is to serve the end of administrative convenience. She misconstrues the means adopted by the School Board and the ends which the regulation are designed to achieve. The statutes in *Reed* and *Frontiero* are unlike the rule in this case in that their sole asserted purpose was to save money by promoting speed and efficiency in administration. Here the primary purpose of the maternity leave policy is not to promote speed and efficiency or a similar administrative goal, but to provide a better education to pupils in the Chesterfield County School system.

The petitioner also criticizes the rule by asking why a rule does not exist for broken legs or a condition such as prostatitis. The answer to both is obvious: The timing of a broken leg never has predictability and it is impossible to plan for its inconvenience. For prostatitis, it is submitted that such a condition does not present a significant problem in a school system in which 80% of the teachers are women.

Pregnancy on the other hand obviously creates problems which both the School Board and the teachers considered important enough to regulate. Certainly the School Board need not through regulations provide for every foreseeable problem, much less those as remote and inconsequential as broken legs and protatitis.

In *Weber* v. *Aetna Casualty and Surety Company,* 406 U.S. 164, 173 (1972) the Court stated that the essential inquiry in all equal protection cases is a dual one:

> What legitimate state interests does the classification promote? What fundamental personal rights might the classification endanger?

Thus, this case involves the resolution of the interest of a teacher in working during the final months of her pregnancy and the interest of a School Board in providing a better education. Petitioner has no fundamental right to public employment, but the School Board has the difficult responsibility of finding qualified replacements for teachers who must take a leave of absence because of pregnancy.

Petitioner expects too much when she asks that the School Board determine on a case-by-case basis when individual pregnant teachers should stop teaching. In many instances qualified replacement teachers are difficult to locate, and, when they are found they reasonably expect a firm date to commence employment, not an uncertain date to be determined in the future by a pregnant teacher and her doctor. Thus, the regulation in the instant case is not, as the petitioner contends, one which is aimed at protecting women, or placing women on a pedestal; rather, it is designed to accommodate the interests of the school in providing continuity of education, the interest of the replacement teacher in having a firm date to report to work, and the interest of the preg-

nant teacher in working up to a time before her delivery which is reasonable for all concerned.

The School Board, and not the teacher, bears the ultimate responsibility for providing quality education to students. The School Board is seriously hampered in discharging this responsibility, however, if it does not have authority to fix uniform rules governing the replacement of teachers who, because of pregnancy, will become unavailable at a fixed point in time.

If the decision about when to take maternity leave were left to each pregnant teacher, the purpose of the regulation would be frustrated. It is easy to imagine cases in which a pregnant school teacher would, for some reason or for no reason, change her mind and discontinue teaching either sooner or later than she originally planned. In either case the element of predictability sought by the School Board has been thwarted, and it is faced either with a replacement teacher and no opening, or an opening and no replacement teacher.

Unquestionably there is not complete predictability under the regulation. A pregnant school teacher could decide, or be required medically, to discontinue teaching in the second or third month of pregnancy. But the regulation seeks to establish a degree of predictability that clearly is lacking where each pregnant teacher controls when her maternity leave will begin. In this case the regulation is simply an effort to minimize the risk of unpredictability, which is essentially what Dr. Kelly said in his testimony.

Respondents submit that the maternity leave policy represents a reasonable method to achieve continuity in education, and it does not result in arbitrary discrimination. While it may not be the perfect solution to the problem, it is the type of problem which is best solved by local officials. As this

Court recently stated in *Rodriquez, supra,* 36 L.Ed. 2d at 48-49:

> [E]ducational policy [is] another area in which this Court's lack of specialized knowledge and experience counsels against premature interference with the informed judgments made at the state and local levels. Education, perhaps even more than welfare assistance, presents a myriad of "intractable economic, social, and even philosophical problems." *Dandridge* v. *Williams,* 397 U.S. at 487, 25 L. Ed. 2d 491. The very complexity of the problems of financing and managing a statewide public school system suggest that "there will be more than one constitutionally permissible method of solving them," and that, within limits of rationality, "the legislature's efforts to tackle the problems" should be entitled to respect. *Jefferson* v. *Hackney,* 406 U.S. 535, 546-547, 32 L. Ed. 2d 285, 92 S. Ct. 1724 (1972). On the most basic questions in this area the scholars and educational experts are divided. . . . The ultimate wisdom as to these and related problems of education is not likely to be divined for all time even by the scholars who now so earnestly debate the issues. In such circumstances the judiciary is well advised to refrain from interposing on the States inflexible constitutional restraints that could circumscribe or handicap the continued research and experimentation so vital to finding even partial solutions to educational problems and to keeping abreast of ever changing conditions.

ARGUMENT V.

The Fourth Circuit's Exercise Of Discretion Under Rule 40 Of The Federal Rules Of Appellate Procedure Not To Grant Reargument Is Not A Denial Of Due Process Of Law.

The petitioner has created a new issue before this Court. She alleges that the Court of Appeals for the Fourth Circuit denied her due process of law by granting a rehearing *en banc*

without allowing counsel for petitioner to file a brief and make oral argument in opposition.

Rule 40(a) of the Federal Rules of Appellate Procedure provides in part:

> No answer to a petition for rehearing will be received unless requested by the court, but a petition for rehearing will ordinarily not be granted in the absence of such a request. If a petition for rehearing is granted the court may make a final disposition of the cause without reargument or may restore it to the calendar for reargument or resubmission or may make such other orders as are deemed appropriate under the circumstances of the particular case.

The rule clearly provides for the procedure utilized by the court in this case, and an attempt by petitioner to characterize the court's exercise of discretion as a denial of due process is wholly without merit.

Under Rule 35 of the Federal Rules of Appellate Procedure a rehearing *en banc* is not granted unless a majority of the circuit judges who are in regular active service agree that the case warrants a rehearing *en banc*. It is obvious that a majority of the court wished to reconsider this matter, and Rules 40 makes it entirely discretionary with the court to determine how this will be accomplished.

Petitioner complains that she was not allowed to provide additional authorities to the court. Counsel for petitioner has filed two letters in petitioner's brief, one to the Court of Appeals for the Fourth Circuit dated January 9, 1973, and the response thereto from the Clerk dated June 17, 1973. Neither of these two letters are part of the record in this case (see A. 125-128 for docket entries). Coincidentally, counsel for petitioner has left out of the appendix to petitioner's brief letters which were presented to the court by him during the time the court had this matter under consideraion. These letters

are attached in the Appendix to this brief, as well as transmittals of these letters by the Clerk to the court. While the case was under consideration counsel "apprised" the court of cases which were viewed as beneficial to his position, yet it is now contended that petitioner was denied the opportunity to advise the court of recent decisions. In point of fact, every case cited in footnote 17 on page 36 of petitioner's brief had been previously furnished to the Court by petitioner. It is clear therefore, that petitioner did in fact furnish additional authorities, although the format was not reargument granted by the court. Under these circumstances the denial of which petitioner complains is more apparent than real.

CONCLUSION

The respondents submit that the maternity leave regulation of the School Board of Chesterfield County, Virginia violates no right of the petitioner under the Fourteenth Amendment. The decision of the United States Court of Appeals for the Fourth Circuit should be affirmed.

Respectfuly submitted,

CHESTERFIELD COUNTY SCHOOL BOARD, and
DR. ROBERT F. KELLY

APPENDIX

[Letterhead Omitted]

* * *

June 21, 1972

Received
Jun 22 1972

Clerk, U.S. Court of Appeals
Fourth Circuit
Richmond, Va.

Clerk of Court
United States Court of Appeals
Post Office Building
Richmond, Virginia 23219

Re: Cohen v. Chesterfield County
School Board, et al,
No. 71-1707

Dear Sir:

We have not yet received an opinion in the captioned case. We would like to bring your attention to new decisions which have come down since the time of argument and filing of briefs in this matter. I have enclosed copies for the court of: *Robinson* v. *Rand,* ..... F. Supp. ..... (D. Colo. March 21, 1972); *Carruth* v. *Avila,* Superior Court, Maricopa Co., Ariz., CA No. 237274; *Dow, et al* v. *Osteopathic Hospital of Wichita,* 333 F. Supp. 1357 (D. Kansas 1971); *Williams* v. *School Dist.,* ..... F. Supp. ..... (N.D. Calif. 1972), 4 FEP Cases 498; *Monell, et al* v. *Dept. of Social Services of New*

York, 71 Civ. 3324 (S.D.N.Y. April 12, 1972); *Danielson* v. *Bd. of Education of the City University of New York* (S.D. N.Y. April 12, 1972).

Very truly yours,

/s/ Philip J. Hirschkop

NCC:amg
cc: Frederick T. Gray, Esquire
Oliver D. Rudy, Esquire
Ms. Cynthia Edgar, Attorney at Law

[Letterhead Omitted]

June 22, 1972

Honorable Clement F. Haynsworth, Jr.
Chief Judge, Fourth Circuit

Honorable Harrison L. Winter
United States Circuit Judge

Honorable Joseph H. Young
United States District Judge

No. 71-1707, Cohen v. Chesterfield

County School Board, et al.

Gentlemen:

Enclosed is a copy of a letter from Mr. Philip J. Hirschkop, with enclosures, which is self-explanatory.

This case was argued on January 4, 1972.

Respectfully,

Russell W. Riley
Senior Deputy Clerk

RWR/vsl

Enclosures

[Letterhead Omitted]

July 20, 1972

Received
Jul 24 1972

Clerk, U. S. Court of Appeals
Fourth Circuit
Richmond, Va.

The Honorable Sam Phillips, Clerk
United States Court of Appeals
for the Fourth Circuit
Post Office Building
Richmond, Virginia 23219

RE: Cohen v. Chesterfield County School Board, et al
No. 71-1707

Dear Mr. Phillips:

I am in receipt of the letter dated July 3, 1972 to the Clerk of the Court on behalf of the appellants in the above case. That letter brings to the Court's attention the case of *Schattman* v. *Texas Employment Commission,* which it states I

omitted from my statement of recent cases in my letter of June 21. I would like to bring to the Court's attention that by letter of April 28, 1972, the Equal Employment Opportunities Commission, which has entered this case as amicus, brought to the Court's attention the reversal in the *Schattman* case. I enclose a copy of the letter of April 28 to which I refer.

I would also like to bring to the Court's attention another recent case, *Bravo* v. *Board of Education,* which is reported at 41 Law Week 2029. That decision is very pertinent to the present case and supportive of the position of the appellees in this matter. I enclose three copies of this letter with the original to you for distribution to the three judges which I hereby request be done.

Very truly yours,

/s/ Philip J. Hirschkop

PJH:hns

cc: Samuel W. Hixon, III, Esquire

Frederick T. Gray, Esquire

Cynthia Edgar Gitt, Attorney at Law

Enclosures as stated

App. 5

[Letterhead Omitted]

July 24, 1972

The Honorable Clement F. Haynsworth, Jr.
Chief Judge

The Honorable Harrison L. Winter
United States Circuit Judge

The Honorable Joseph H. Young
United States District Judge

Re: 71-1707 Mrs. Susan Cohen v. Chesterfield County School Board, et al.

Gentlemen:

Enclosed for your information is a copy of a letter from Mr. Hirschkop dated July 20, 1972, and a copy of a letter from the Equal Employment Opportunity Commission to Mr. Phillips dated April 28, 1972.

The letter July 3 referred to in Mr. Hirschkop's letter was transmitted to you on July 3, 1972.

This case was argued on January 4, 1972.

Respectfully,

Carol R. Lemon
Chief Deputy Clerk

CRL/dhb
Enclosures

App. 6

Equal Employment Opportunity Commission
Washington, D. C. 20506

April 28, 1972

Samuel W. Phillips, Clerk
United States Court of Appeals
for the Fourth Circuit
Richmond, Virginia 23219

Re: *Cohen* v. *Chesterfield County School Board et. al.*
No. 71-1707

Dear Mr. Phillips:

The Commission would like to call the attention of the Court to two new developments which may affect the Court's decision in the above-styled case.

First, when this case was filed in the District Court and argued on appeal, schoolteachers were specifically exempted from coverage by Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e *et seq*. Section 702 of that Act, 42 U.S.C. §2000e-1 provided: "This title shall not apply . . . to an educational institution with respect to the employment of individuals to perform work connected with the educational activities of such instituion."

Title VII has now been amended by the Equal Employment Opportunity Act of 1972, P.L. 92-261, which was signed by the President on March 24, 1972, and became *effective immediately*. The language of former Section 702 exempting educational institutions from coverage, has been deleted from the new Section 702. In addition, activities as employers of state governments and political subdivision, are now governed by Sections 701(a) and (b) of the new Act. A copy of those sections as amended is enclosed for the Court's convenience.

Thus, schoolteachers are now covered by Title VII. School boards, as political subdivisions, are prohibited from discriminating against employees (including teachers) because of sex, race, color, religion, or national origin.

The second new development is the Commission's passage of guidelines on pregnancy and childbirth, effective April 5, 1972, the date of publication in the Federal Register, 37 F.R. 6837. Under the new guidelines, exclusion of employees "from employment . . . because of pregnancy is in *prima facie* violation of Title VII." 29 C.F.R. 1604.10(a). Indeed, the guidelines require employers to treat disabilities caused by pregnancy and childbirth in the same way that other temporary disabilities are treated. 29 C.F.R. 1604.10(b). These guidelines, which apply to teachers as well as to all other employees, are enclosed for the Court's convenience.

Commission guidelines are entitled to "great difference," *Griggs* v. *Duke Power Co.,* 401 U.S. 424 91 S.Ct. 849, 855 (1971). And while they do not govern the pending case, they do offer an appropriate standard to use in deciding this case. It would be anomolous to hold that teachers who bring suit under the Equal Protection Clause are entitled to *less* protection against sex discrimination than teachers who bring suit under Title VII.

Finally, the Commission would inform the Court that the Fifth Circuit has recently granted to the Appellants in *Schattman* v. *Texas Employment Commission,* F.2d (C.A. 5, 1972), a 30-day extension of time to file a Petition for Rehearing. The Commission will participate in those proceed-

ings to urge that the decision reached by the majority was incorrect.

Sincerely yours,

/s/ Cynthia E. Gitt
Cynthia E. Gitt
Attorney
Office of the General Counsel

Enclosures
cc:
John B. Mann, Esq.
Philip J. Hirschkop, Esq.
Oliver D. Rudy, Esq.
Morris E. Mason, Esq.
Frederick T. Bray, Esq.

[Letterhead Omitted]

Received
Aug 7 1972

Clerk, U.S. Court of Appeals
Fourth Circuit
Richmond, Va.

August 3, 1972

Clerk,
United States Court of Appeals
Post Office Building
Richmond, Virginia

Re: Cohen v. Chesterfield Co.
No. 71-1707

Dear Sir:

Enclosed please find a copy of the recent opinion in the matter of *LaFleur* v. *Cleveland Board of Education*. The

LaFleur case was the major case upon which the Defendants (Appellants) relied and which now has been reversed. We draw this Courts' attention particularly to the language on page 7 of the Slip Opinion at the bottom regarding the "rule which is inherently based upon a classification by sex" and that "pregnant women teachers have been singled out for unconstitutionally unequal restrictions upon their employment." I am enclosing three copies of the opinion and would appreciate it if they were distributed to the Judge's for their convenience.

Very truly yours,

/s/ Philip J. Hirschkop

Philip J. Hirschkop

PJH/pm
encl.
cc: S. Hixon, M. Mason
F. T. Gray, J. B. Mann,
J. P. Cooper

[Letterhead Omitted]

August 7, 1972

The Honorable Clement F. Haynsworth, Jr.
Chief Judge, Fourth Circuit

The Honorable Harrison L. Winter
United States Circuit Judge

The Honorable Joseph H. Young
United States District Judge

No. 71-1707—Mrs. Cohen v. Chesterfield County School Board, et al

Gentlemen:

Enclosed is a copy of a leter from Philip J. Hirschkop, Esquire, with attachments which is self-explanatory.

This case was argued on January 4, 1972.

Respectfully,

Russell W. Riley
Senior Deputy Clerk

RWR:fs
Encl.

[Letterhead Omitted]

Received
Jan 2 1973

Clerk, U.S. Court of Appeals
Fourth Circuit
Richmond, Va.

December 29, 1972

The Honorable William K. Slate, Clerk
United States Court of Appeals
Fourth Circuit
Post Office Building
Richmond, Virginia 23219

RE: Cohen v. Chesterfield County School Board, No. 71-1707

Dear Mr. Slate:

Several months ago, appellants in the captioned matter filed a Petition for Rehearing which is still pending. Since that time, we have brought to the Court's attention several Federal rulings favorable to the appellees, including *LeFleur*

v. *Board of Education* in the Sixth Circuit, and District Court opinions in San Francisco (*Williams* v. *Unified School District*) and Chicago (*Bravo* v. *Board of Education*). Additionally, we have brought to the Court's attention, the new guidelines of the Equal Employment Opportunity Commission.

We would now like to bring to the Court's attention another recent Federal Court decision exactly on point and favorable to the appellees, *Heath* v. *Westerville Board of Education*, 345 F.Supp. 501 (S.D. Ohio 1972).

Very truly yours,

/s/ Philip J. Hirschokp by Dan

Philip J. Hirschkop

PJH:hns

cc: Samuel W. Hixon, III, Esquire
Frederick T. Gray, Esquire
Cynthia Edgar Gitt, Attorney at Law

App. 12

[Letterhead Omitted]

January 2, 1973

The Honorable Clement F. Haynsworth, Jr.
Chief Judge
The Honorable Harrison L. Winter
United States Circuit Judge

The Honorable Joseph H. Young
United States Circuit Judge

Re: No. 71-1707 Susan Cohen v. Chesterfield County

Re: School Board

Gentlemen:

Enclosed is a letter from counsel for the appellee which is self-explanatory.

Respectfully,

Russell W. Riley
Senior Deputy Clerk

RWR/dhb

Enclosure

cc: The Honorable J. Braxton Craven, Jr.
The Honorable John D. Butzner, Jr.
The Honorable Donald Russell
The Honorable John A. Field, Jr.
The Honorable H. Emory Widener, Jr.